STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 20, 2013

In the Matter of JONES, Minors.

No. 313689
Wayne Circuit Court
Family Division
LC No. 08-477090-NA

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to her two minor children pursuant to MCL 712A.19b(3)(i) and (l). We affirm.

In 2008, respondent's first child died from shaken baby syndrome and her death was ruled a homicide. Respondent and the child's father were suspects in the homicide investigation, but no one was charged in the case. In 2009, respondent's parental rights to her second child were terminated. The proceedings at issue here relate to respondent's third and fourth children.

A bench trial was conducted regarding the best interests of the children, after the parties stipulated that statutory grounds for termination existed. During the trial, the assigned foster care worker testified that respondent was unable or unwilling to protect and provide security to her children. The foster care worker testified that respondent's family had an extensive CPS history and that respondent was going to be living with these same family members, despite the fact that her first child suffered fatal injuries while living with them. Further, on direct examination the care worker testified that respondent refused to cooperate with the homicide investigation related to the death of her first child. On cross-examination, respondent's attorney then asked the care worker as to "what specifically did [respondent] say; do you recall?" The care worker responded that, although she told respondent that the police wanted to talk to her about the homicide and that another person had taken a lie detector test, respondent refused to take a lie detector test. Later the care worker testified that she believed respondent's priority was protecting her family rather than her children because, in several conversations she had with respondent, respondent said she was not going to talk to the homicide investigators regarding her first child's death. And the care worker had confirmation from a law enforcement officer that respondent had been asked to take a lie detector test and she had refused.

At the conclusion of the bench trial, the trial court discussed the evidence presented, including a report from the Clinic for Child Study which indicated that respondent would not cooperate with the homicide investigation, continued to defend her family, and said that she

"would never turn against my family if that's what they (police officers) wanted me to do." The report also indicated that respondent had a history of angry outbursts, and that her ability to make proper judgments was severely compromised. The prognosis provided was that respondent's ability to provide the children "with a safe, secure home environment they need to ensure their physical and emotional well-being is poor." Thus, the clinician did not believe it was in the children's best interests to be returned to respondent's care.

Thereafter, the trial court concluded that clear and convincing evidence existed that termination of respondent's parental rights was in the children's best interests. The trial court held that respondent had about four years to cooperate with the homicide investigation and protect her children, but instead chose to protect her family despite the consequences. The court held that the children were not safe with respondent. Respondent intended to continue bringing these children around her family despite their extensive CPS history and her first child's death, endangering their lives. Accordingly, the trial court held that termination of respondent's parental rights was in the children's best interests.

On appeal, respondent first argues that the assistant "attorney general's reference to [respondent's] refusal to take a polygraph examination as failing to cooperate with the investigating officers constitutes reversible error." We disagree. Because respondent failed to object to any of the references to a polygraph examination, we review this unpreserved claim for plain error affecting her substantial rights, i.e., error that affected the outcome of the proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted).

Generally, it is plain error to reference a polygraph test or the refusal to take a polygraph. *People v Kahley*, 277 Mich App 182, 183-184 n 1; 744 NW2d 194 (2007); *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). But this plain error does not always require reversal. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000). To determine whether reversal is required, this Court has previously analyzed a number of factors, including (1) whether there was an objection, (2) whether the reference was inadvertent, (3) whether there were repeated references, (4) whether the reference was an attempt to bolster a witness' credibility, and (5) whether the results of the test were admitted. *Id*., quoting *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982) (citation omitted). These factors guide our review of this forfeited error, to determine whether respondent was prejudiced by the polygraph references, i.e., whether the error affected the outcome of the proceedings. *Nash*, 244 Mich App at 96-97.

Here, respondent did not object to the polygraph references. Further, the first reference to a polygraph was elicited from the care worker during respondent's cross-examination and was not an attempt to bolster her own credibility. The reference to respondent's refusal to take a polygraph was also not an attempt to discredit respondent's credibility; rather, it related to respondent's unwillingness to cooperate with the police investigation regarding her first child's death which was ruled a homicide. That is, the polygraph references related to respondent's inability to parent her children and unwillingness to protect her children, which were issues before the trial court. And because respondent did not take a polygraph, no results were admitted into evidence. These factors, therefore, do not weigh in favor of respondent. And, although the assistant attorney general did reference respondent's refusal to take a polygraph during closing

argument, there was other substantial evidence regarding respondent's refusal to cooperate with the police investigation. In light of our analysis of the applicable factors, we cannot conclude that respondent was prejudiced by the references to her failure to take a polygraph examination. Further, we note that this was a bench trial and a judge is presumed to understand the law, including what evidence is admissible and not admissible. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Accordingly, the admission of the polygraph references did not constitute error requiring reversal.

Next, respondent argues that the trial court clearly erred in finding that termination of her parental rights was in the children's best interests. We disagree. A trial court's decision regarding the children's best interests is reviewed for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004), the parent's parenting ability, *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009), the child's safety and well-being, *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011), and the child's "need for permanency, stability, and finality," *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992).

In this case, the trial court did not clearly err in finding that termination of respondent's parental rights was in the best interests of the children. The evidence established that respondent was unable or unwilling to properly parent the children, to provide for their safety and well-being, and to provide permanency and stability for the children. Respondent's first child's death was ruled a homicide yet respondent, even years later, was unwilling to cooperate with the police investigation related to her death. Respondent also planned on living with several family members, despite the facts that (1) her first child's fatal injuries occurred while living with those family members, and (2) those family members had an extensive CPS history. This evidence demonstrated respondent's unwillingness to protect her children. The evidence also included that respondent had a history of angry outbursts, that her ability to make proper judgments was severely compromised, and that her ability to properly provide for her children's safety and welfare was considered poor. In light of the evidence presented in this case, we are not left with a definite and firm conviction that a mistake has been made. See *In re JK*, 468 Mich at 209-210.

Finally, respondent appears to argue that the assistant prosecuting attorney committed misconduct during closing argument by making statements of fact unsupported by the evidence. We disagree. Because respondent did not place any such objection during closing argument, our review is for plain error affecting respondent's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

The test of prosecutorial misconduct is whether a defendant has been denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial

misconduct issues are decided after examining the record and evaluating the remarks in context in light of the evidence, as well as the facts of the case. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Although a prosecutor may not make a statement of fact that is unsupported by the evidence, she is free to argue the evidence and all reasonable inferences arising from the evidence as relates to her theory of the case. *People v Unger*, 278 Mich App 210, 236, 241; 749 NW2d 272 (2008).

Here, respondent argues that the assistant prosecuting attorney improperly argued that she "was not cooperating with the authorities because she was trying to hide something." Respondent claims that the evidence did not support that theory and that "[i]t is implausible that the police would want mother to assist them in their investigation." Contrary to MCR 7.212(C)(7), respondent has failed to specifically reference any such argument by the assistant prosecuting attorney in her brief on appeal. However, we have reviewed the record and conclude that respondent's argument is without merit. The assistant prosecuting attorney did not state or imply that respondent failed to cooperate with the homicide investigation because "she was trying to hide something." The assistant prosecuting attorney argued that, despite the fact that her first child's death was ruled a homicide, respondent refused to cooperate with the police investigation. Contrary to respondent's claim on appeal, it is "plausible" that the police might acquire helpful information from respondent because respondent was that child's mother, she had custody of that child, and she was caring for that child at the time she suffered fatal injuries. Further, during her closing argument, the assistant prosecuting attorney did not make statements of fact that were unsupported by the evidence; rather, she extensively referenced the court file, as well as the records admitted into evidence, in support of her argument that termination of respondent's parental rights was in the children's best interests. Accordingly, respondent's claim of prosecutorial misconduct is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey